88-595

Supreme Court, U.S.
FILED
AUG 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

COUNTY OF SUMMIT, *Petitioner*,

v.

CITY OF AKRON, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

KENT M. GRAHAM
175 South Main Street
Akron, Ohio 44308
(216) 379-2519

JERRY SLOAN
175 South Main St.
Akron, Ohio 44308
(216) 379-2507

Counsel of Record

KERRY BRUCE
25 North Main Street
Akron, Ohio 44308
(216) 379-2404

Counsel for Petitioner

August 23, 1988

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment's equal protection clause shields only the residents and not extraterritorial customers from a municipality's discriminatory water rates.

2. Whether a political subdivision has waived its Fourteenth Amendment equal protection rights against a municipally owned water utility by signing a written contract containing discriminatory water rates.

3. Whether a political subdivision may assert a Fourteenth Amendment equal protection claim against another political subdivision in state court.

[Note: Petitioner reserves the right to argue Questions 4 and 5 in the event certiorari is granted on any of the above questions but does not include Questions 4 and 5 among the reasons for grant of certiorari.]

4. Whether a municipaliy owned water utility which fails to appeal a state appellate court decision finding its rates discriminatory waives its right to challenge that judgment after submitting to a new trial at which no evidence is presented justifying the discrimination.

5. Whether a municipally owned water utility may consider the value of water service to a customer with no other source of supply in establishing a water rate.

LIST OF PARTIES

The parties to the proceedings below were the petitioner County of Summit and the respondent City of Akron. Fairway Manor, Inc. was a party to the original action in the trial court but received the relief it sought and has not participated in any of the subsequent appeals. Since none of the issues involved in this petition would have any effect on Fairway Manor, Inc., it has not been named as a party herein.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

I.

The Ohio Supreme Court's limitation of Fourteenth Amendment equal protection to a municipal water supplier's city limits conflicts with decisions of this Court and other state supreme courts 8

II.

The Ohio Supreme Court's holding that equal protection rights may be waived by a political subdivision in a written agreement with a municipal water supplier absent express language to that effect conflicts with decisions of this Court. 11

III.

The Ohio Supreme Court's refusal to consider the federal equal protection claim raised by a political subdivision against a municipal water supplier raises an unresolved issue concerning the breadth of Fourteenth Amendment protection 14

CONCLUSION 15

APPENDIX

Opinion, Judgment and Rehearing Entry of the Ohio Supreme Court 1a

Motion for Rehearing 15a

TABLE OF AUTHORITIES

Cases: Page

Avon Lake City School Dist. v. Limbach, 35 Ohio St. 3d 118, 518 N.E. 2d 1190 (Ohio 1988) . . . 14, 15

Brookhart v. Janis, 384 U.S. 1 (1966) 12

City of Texarkana v. Wiggins, 246 S.W. 2d 622 (Texas 1952) 10

Cuyahoga River Power Company v. City of Akron, 240 U.S. 462 (1916) 9

Fairway Manor, Inc. v. City of Akron, 13 Ohio App. 3d 233, 468 N.E. 2d 927 (Ohio App. 1983) . . .2, 6

Fairway Manor, Inc. v. Bd. of Commrs. of Summit Cty., 36 Ohio St. 3d 85, 521 N.E. 2d 818 (Ohio 1988) 1, 8, 9, 11

Gaines v. Preterm-Cleveland, Inc., 33 Ohio St. 3d 54, 521 N.E. 2d 818 (Ohio 1988) 7

Hansen v. City of San Buenaventura, 729 P.2d 186 (Cal. 1986) 10

Lyle Construction, Inc. v. Division of Reclamation, 34 Ohio St. 3d 22, 516 N.E. 2d 209 (Ohio 1987) 7

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) 9

Shelley v. Kraemer, 334 U.S. 1 (1948) 13

South Macomb Disposal Authority v. Township of Washington, 790 F.2d 500 (6th Cir. 1986) 11, 14, 15

Stevens v. Marks, 383 U.S. 234 (1966) 12

Township of River Vale v. Town of Orangetown,
403 F. 2d 684 (2nd Cir. 1984) 15

Water Works Bd. of Birmingham v. Barnes,
448 So. 2d 296 (Ala. 1983) 11

Miscellaneous:

12 McQuillan, *The Law of Municipal Corporations*,
Section 34.101 (3rd ed. 1986) 6

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

COUNTY OF SUMMIT, *Petitioner*

v.

CITY OF AKRON, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner County of Summit respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in the above-entitled proceeding on April 13, 1988.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 36 Ohio St.3d 85, 521 N.E.2d 818 (Ohio 1988), and is reprinted in the appendix hereto, p. 1a, *infra*.

The second opinion of the court of appeals, the trial court's decision on remand and the original opinion of the trial court have not been reported. The first opinion of the court of appeals is reported at 13 Ohio App. 3d 233, 468 N.E. 2d 927 (Ohio App. 1983).

JURSIDICTION

Fairway Manor, Inc. filed suit in Ohio common pleas court on April 10, 1981 against both petitioner and respondent seeking water service to its real estate development. Petitioner filed a cross-claim against respondent alleging, among other things, unreasonable and discriminatory water rates, and respondent filed a cross-claim alleging breach of contract. Fairway Manor, Inc. received its water connection shortly after the suit was instituted and the matter proceeded to trial solely on the cross-claims. The trial court entered judgment in favor of respondent on all issues.

On petitioner's appeal, the state appellate court on December 23, 1983 reversed the trial court by finding that petitioner had presented a prima facie case of rate discrimination. *Fairway Manor, Inc.. v. City of Akron*, 13 Ohio App.3d 233, 468 N.E.2d 927 (Ohio App. 1983). Respondent did not appeal this decision. On remand, the trial court again entered judgment in favor of respondent.

Petitioner appealed and the state appellate court reversed the trial court for the second time on April 8, 1987 holding that respondent had failed to present evidence to justify the water rate discrimination. The appellate court remanded for further proceedings to enter relief for petitioner.

Respondent appealed to the Ohio Supreme Court and a motion to certify the record was granted September 2, 1987. The Ohio Supreme Court reversed the decision of the court of appeals and reinstated the trial court judgment in a decision dated April 13, 1988. See p.1a

infra. Petitioner filed a motion for rehearing on April 22, 1988 (p. 15a, *infra*) which was denied by the Ohio Supreme Court on May 25, 1988 (p. 14a, *infra*).

The jurisdiction of this Court to review the judgment of the Ohio Supreme Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is an Ohio county operating under a charter form of government and exercising municipal powers concurrently with other Ohio municipalities. In 1981, petitioner filed claims against the City of Akron, an Ohio municipality and respondent herein, to redress unjustified

water rate discrimination which deprived petitioner of its equal protection rights secured by the Fourteenth Amendment.

The discrimination involves charging petitioner 87 percent more for wholesale water than a similarly situated customer, the City of Tallmadge (hereinafter "Tallmadge"), despite the undisputed fact that the cost of serving both customers is the same. As a result, residents in two neighboring cities who are alike both economically and demographically pay vastly differing amounts for the identical product--water. Petitioner's viability as a retail water supplier and potential competitor of respondent has been seriously crippled.

Petitioner first entered into a wholesale agreement with respondent on May 16, 1972. The operation of a retail water system outside respondent's city limits was successful and petitioner was soon able to offer rates nearly as low as those offered by respondent inside Akron. Citing a need to raise wholesale rates to keep suburban rates high, respondent in 1977 gave petitioner the required two years notice for termination of the water contract.

Negotiations on a new contract continued for two years. Respondent advised petitioner that water service might cease or, if allowed to continue, would be provided at a cost higher than that being negotiated if a contract was not signed by the May 19, 1979 termination date. Petitioner approved a new water contract on May 19, 1979 which resulted in a rate increase of nearly 90 percent.

The new rate to petitioner equalled the rate charged to a customer within respondent's city limits plus a

surcharge of 105 percent. In contrast, the rate charged to respondent's only other wholesale customer, Tallmadge, represented a surcharge of only 10 percent. Respondent tried and failed to increase Tallmadge's rate but took no further action against the city. Consequently, petitioner asked for the renegotiation of its own rate. Respondent refused to negotiate a lower rate for petitioner and, to this date, continues to serve Tallmadge and petitioner at two very disparate rates.

At trial, respondent admitted that the water rates charged to petitioner and Tallmadge respectively were discriminatory (Additional Record AR 1-2; T.21-22). The water rate experts hired by both petitioner and respondent agreed that there were no engineering or other cost factors which justified the rate disparity (AR 3,4, 5-6; T.130, 208, 251-52). The cost of service studies of both experts agreed that petitioner was paying about double what it cost respondent to supply petitioner with water (Def. Ex. 13, 14).

The trial court, although recognizing the "manifest discrimination" caused by the rates, found that the substantial difference in rates was not illegal because Tallmadge had an alternative water supply and petitioner did not. In its decision, the court reasoned that the lack of an alternative water supply rendered the water more valuable to petitioner than Tallmadge and, thus, petitioner should pay a higher price.

Petitioner appealed from that decision citing, among other grounds, that the trial court erred in upholding a discriminatory rate which was based solely on the alleged value of service to petitioner. In a reported decision, the court of appeals reversed the trial court and held that "the County met its burden of going

forward with its evidence to demonstrate the rate differential between Tallmadge and the County is discriminatory on its face." *Fairway Manor, Inc. v. City of Akron*, 13 Ohio App.3d 233 at 237, 468 N.E.2d 927 at 932 (Ohio App. 1983). The case was remanded with instructions that the trial court should not consider the value of the service to petitioner in deciding whether the rate was unjustly discriminatory.

Respondent did not appeal from the appellate court's decision. On remand, respondent declined the trial court's offer of an evidentiary hearing. Instead, respondent simply submitted a brief which recited the same arguments presented during the first trial. Petitioner argued that respondent was required to present new evidence to rebut the evidence from the first trial which established that Tallmadge and petitioner were similarly situated and that there were no cost factors which justified the rate differential. Respondent presented no evidence regarding either issue.

The trial court, in its remand opinion, again held that the rate discrimination was justified. Petitioner appealed the decision of the trial court on the grounds that the trial court did not apply equal protection standards to the water rate discrimination and that respondent had not met its burden of presenting evidence to rebut petitioner's showing of unjust discrimination.

For the second time, the court of appeals reversed the trial court and held that respondent had failed to present any evidence of greater expense or difficulties in serving petitioner which would justify a higher rate than that charged to Tallmadge. The court, citing 12 McQuillan, *The Law Of Municipal Corporations*, 285-87, Section 34.101 (3rd ed. 1986), held that discrimination

may not be based on the value of the service to the customer. It sustained petitioner's assignments of error, reversed the trial court judgment, and remanded the case for further proceedings on the relief sought by petitioner. Respondent appealed this judgment to the Ohio Supreme Court.

The Ohio Supreme Court reversed the court of appeals decision and stated that a municipality is prohibited only from discriminating against its own residents. The court went further and declared that discrimination in rates may be based on the value of service to the customer.

A timely motion for rehearing (p. 15a, *infra*) was filed by petitioner seeking to have the Ohio Supreme Court address its equal protection claims under the United States and Ohio constitutions. Petitioner had presented written federal and state equal protection arguments in its trial brief to the common pleas court, first appeal of the trial court decision (see assignment of error #1), brief on remand to the trial court, appeal of the remand decision (assignment of error #3), and the brief to the Ohio Supreme Court.

Petitioner pointed out that the court's opinion failed to apply equal protection standards to the admitted discrimination practiced by respondent even though both petitioner and respondent agreed upon the standard applicable to the case. The opinion's author cited no state or federal equal protection cases despite the fact that he had written two other majority opinions in the prior six months in which equal protection under both the United States and Ohio constitutions had been extensively discussed. *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 514 N.E.2d 709 (Ohio 1987); *Lyle*

Construction, Inc. v. Division of Reclamation, 34 Ohio St.3d 22, 516 N.E.2d 209 (Ohio 1987).

Instead, the court's authorization of discrimination outside the city limits and implied waiver of constitutional rights were issues which were neither briefed nor argued by either party. To add to the confusion, no case law was cited by the court to justify these revisions to established state and federal equal protection case law.

The Ohio Supreme Court denied petitioner's motion for rehearing on May 25, 1988.

REASONS FOR GRANTING THE WRIT

I.

The Ohio Supreme Court's limitation of Fourteenth Amendment equal protection to a municipal water supplier's city limits conflicts with decisions of this Court and other state supreme courts.

The Ohio Supreme Court has rewritten constitutional law by deciding that the Fourteenth Amendment's Equal Protection Clause does not apply to a municipal utility's actions outside the city limits. By so doing, the state court has removed the only protection many customers have against the unfair practices of a monopolistic supplier of an essential commodity. Such a wholesale elimination of federal rights deserves this Court's review.

The first sentence in the decision below reiterates that, in Ohio, "[a] municipally owned public utility is exempt from restriction or regulation by the General

Assembly" (p. 4a, *infra*). In the second sentence, the opinion limits court control over such utilities "to protecting *residents of the municipality* from the imposition of rates which are unreasonable or which discriminate among such residents" (p. 4a, *infra*; emphasis in original). There was neither discussion of petitioner's federal equal protection claim nor a review of federal case law.

The state court's limitation of Fourteenth Amendment equal protection conflicts with this Court's ruling against respondent sixty-two years ago in *Cuyahoga River Power Company v. City of Akron*, 240 U.S. 462 (1916). That case involved respondent's construction of a dam outside its city limits and its intention to take property and water rights from a hydroelectric power company. The Court reversed the district court's dismissal after finding that the alleged actions of Akron outside its city boundaries constituted state action subject to the restrictions of the Fourteenth Amendment. The finding of state action beyond respondent's borders in *Cuyahoga River Power Company* precludes the state court from now creating arbitrary discrimination zones outside the City of Akron.

The instant case is also in conflict with *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985). In that case, Alabama enacted a lower tax rate on domestic insurance companies than out-of-state insurance companies. As a preliminary matter, the Court stated that it "always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation'" 470 U.S. at 878. If a State may not enact legislation which discriminates

against nonresidents, then presumably a municipality is similarly barred within its own state.

The Ohio Supreme Court's redefinition of the Equal Protection Clause also conflicts with decisions in other States. In Texas, the supreme court has held that the "limits of a municipal corporation, of themselves, do not furnish a reasonable basis for rate differentiation." *City of Texarkana v. Wiggins*, 246 S.W.2d 622 at 626 (Texas 1952). The court made a further statement clearly applicable to the instant case:

> The petitioner makes no contention that it could exact of one nonresident one and one-half times the rate charged another nonresident nor does it contend that it could thus discriminate between its residents. Indeed, it seems very clear that, even reading the statute as petitioner would have us read it, this could not be done.
> 246 S.W.2d at 626.

California has applied federal equal protection standards in determining whether a surcharge imposed by a city on nonresident water customers is justified.

> When social or economic regulations are involved, the rational-basis test applies. In such cases, "'statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'" (*Dandridge v. Williams* (1970) 397 U.S. 471, 485 (quoting *McGowan v. Maryland* (1961) 366 U.S. 420, 426).) The reasonableness test applied to municipal utility rates is somewhat more stringent than the bare rational basis test.
> *Hansen v. City of San Buenaventura*, 729 P.2d 186 at 197 (Cal. 1986).

The Alabama Supreme Court has adopted a similar rational-basis test for nonresident water rates. *Water Works Bd. of Birmingham v. Barnes*, 448 So.2d 296 (Ala. 1983).

The Ohio Supreme Court did not provide any reason for denying equal protection outside respondent's boundaries. Thus, it is not clear if the holding is limited only to municipal utilities or if it applies to other municipal functions as well. Confusion is likely to develop whenever a nonresident raises federal rights against a municipality in state court. Since, as will be discussed later, petitioner is unable to redress this matter in federal court per the decision in *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986), review of the state court decision by this Court is essential.

II.

The Ohio Supreme Court's holding that equal protection rights may be waived by a political subdivision in a written agreement with a municipal water supplier absent express language to that effect conflicts with decisions of this Court.

The state court held that where water rates "are set forth in a contract, such rates will not be struck down as discriminatory even where no factor exists which could justify the rate discrimination" (p. 1a, *infra*, syllabus #2). The clear implication of such a holding is that a water customer waives all federal equal protection rights by signing a written contract with a municipal water utility. No citations or explanation for the loss of Fourteenth Amendment protection accompanied the holding.

The Ohio Supreme Court's creation of an unqualified, involuntary waiver of federal equal protection rights conflicts with this Court's holding in *Brookhart v. Janis*, 384 U.S. 1 (1966). In that case, this Court reversed the Ohio Supreme Court's denial of a criminal defendant's right to cross-examine witnesses who testified against him and stated:

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, see e.g., *Glasser v. United States*, 315 U.S. 60, 70-71, and for a waiver to be effective, it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464.
> 384 U.S. 1 at 4.

The agreement between petitioner and respondent did not contain any explicit or intentional abandonment of Fourteenth Amendment equal protection.

The state court's failure to find a withdrawal of the alleged waiver is similarly in conflict with *Stevens v. Marks*, 383 U.S. 234 (1966) which held:

> Even were we to assume, without deciding, that a State may constitutionally exact, on pain of loss of employment and in the absence of counsel, the waiver of a constitutional right, we would be unable to find any jus' fication for denying the right to withdraw it.
> 383 U.S. 234 at 243-244.

Even if a waiver resulted from the signing of a water contract, petitioner withdrew it when it asked to renegotiate its rate in 1980, one year after signing the agreement. The renegotiation was sought because respondent had not increased the wholesale rate to Tallmadge. Every action taken by petitioner from that point through the filing of an action alleging illegal discrimination evinced a withdrawal of any waiver and the intent to assert constitutional rights. The request for termination of the water agreement in petitioner's prayer for relief is unequivocal proof that a waiver, if effective, was withdrawn.

The decision below also conflicts with *Shelley v. Kraemer*, 334 U.S. 1 (1948) with respect to the issue of a federal rights waiver in a written agreement. That case involved an attempt to enforce racially restrictive covenants on property. The Court found that the Fourteenth Amendment was not "ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement." 334 U.S. 1 at 20.

The Ohio Supreme Court has redefined federal equal protection by: (1) permitting an involuntary waiver of federal equal protection rights; (2) refusing to acknowledge overt action indicating a withdrawal of any such waiver; and (3) refusing to apply constitutional restrictions to conduct performed pursuant to a written agreement. The state court's wide-ranging decision on important constitutional issues conflicts with established federal case law and should be reviewed by this Court.

III.

The Ohio Supreme Court's refusal to consider the federal equal protection claim raised by a political subdivision against a municipal water supplier raises an unresolved issue concerning the breadth of Fourteenth Amendment protection.

The Ohio Supreme Court applied common law remedies to the rate discrimination practiced by respondent. Its refusal to consider petitioner's constitutional arguments stemmed from its decision ten weeks earlier in *Avon Lake City School Dist. v. Limbach*, 35 Ohio St. 3d 118, 518 N.E. 2d 1190 (Ohio 1988). The *Avon Lake* decision held that a political subdivision could not assert Fourteenth Amendment rights against the State. In the instant case, the Ohio Supreme Court has extended that prohibition to actions by one political subdivision against another.

This raises the important question of whether a political subdivision possesses Fourteenth Amendment rights. The Sixth Circuit has ruled that political subdivisions may not raise such rights against other political subdivisions in federal court. *South Macomb Disposal v. Township of Washington*, 790 F. 2d 500 (6th Cir. 1986).

> Therefore, the Fourteenth Amendment simply does not prescribe guidelines and impose restrictions upon one political subdivision vis-a-vis another political subdivision. The relationship between the entities is a matter of state concern; the Fourteenth Amendment protections and limitations do not apply.
> 790 F.2d 500 at 505.

The *South Macomb* decision is in conflict with the Second Circuit's decision in *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2nd Cir. 1984). In that case, the court held that a municipal corporation could raise Fourteenth Amendment rights against parties other than its creator State in federal court:

> Appellees urge that because the township is a political subdivision of the state it cannot assert rights under the due process clause, citing several cases from the Supreme Court and one from this court. None of these cases is in point. In each of them, a municipality was challenging a law of its own state.
>
> . . .
>
> We hold that a municipal corporation like any other corporation is a 'person' within the meaning of the fourteenth amendment and is entitled to its protection.
>
> 403 F.2d 684 at 686.

The Ohio Supreme Court relied upon *South Macomb*, *supra* to deny constitutional rights to school districts in *Avon Lake*, *supra*. It has now refused, in the *Fairway Manor* case, to consider the equal protection claims between political subdivisions presumably upon the authority of *South Macomb*. These decisions preclude petitioner from raising Fourteenth Amendment claims in federal or state courts and call into question whether petitioner does indeed possess such rights.

The federal courts as well as the Ohio Supreme Court need this Court to determine whether political subdivisions have federal equal protection rights. If they do, guidance is needed as to the nature of the parties against whom such rights may be asserted and the courts in which they may be raised. This issue is of

great importance to every political subdivision in the nation.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted. Petitioner reiterates that questions 4 and 5 are not presented as a reason for granting certiorari but because this is the only opportunity for petitioner to seek review of the Ohio Supreme Court's decision that respondent's rate discrimination is justified. If petitioner is correct in stating that it is entitled to Fourteenth Amendment equal protection against petitioner's unjustified discrimination, the matter should be remanded to the Ohio common pleas court for a determination of damages.

Respectfully submitted,

KENT M. GRAHAM
175 South Main Street
Akron, Ohio 44308
(216) 379-2519

JERRY SLOAN
175 South Main St.
Akron, Ohio 44308
(216) 379-2507

Counsel of Record

KERRY BRUCE
25 North Main Street
Akron, Ohio 44308
(216) 379-2404

Counsel for Petitioner

APPENDIX

DECISION OF THE SUPREME COURT OF OHIO

FAIRWAY MANOR, INC. v. BOARD OF COMMISSIONERS OF SUMMIT COUNTY; CITY OF AKRON, APPELLANT; COUNTY OF SUMMIT, APPELLEE.

[Cite as Fairway Manor, Inc. v. Bd. of Commrs. of Summit Cty. (1988), 36 Ohio St. 3d 85.]

Municipal corporations-Municipally owned public utilities-No duty to sell utility's product to extraterritorial purchasers absent contractual obligation-Rates for water set forth in contract will not be stricken as discriminatory, when.

1. Municipally owned public utilities have no duty to sell their products, including water, to extraterritorial purchasers absent a contractual obligation.

2. Where rates for water from a municipally owned public utility are set forth in a contract, such rates will not be struck down as discriminatory even where no factor exists which could justify the rate discrimination.

(No. 87-952-Decided April 13, 1988.)

APPEAL from the Court of Appeals for Summit County.

Plaintiff, Fairway Manor, Inc., filed a complaint on April 10, 1981 against appellant, the city of Akron, and

the Board of Commissioners of Summit County. The complaint sought an order requiring the governmental parties to supply water to plaintiff's condominium project.

Appellant subsequently filed a third-party complaint[1] against appellee, Summit County, and others, stemming from a 1979 contract under which appellant had agreed to supply water to appellee at a fixed rate. Appellant alleged that appellee breached the contract by refusing to make payment in accordance with the terms of the agreement. Appellant prayed for damages and rescission of the contract.

Appellee answered and counterclaimed, admitting that payment had been withheld, but alleging, *inter alia*, that the contract was entered into under duress and that it contained unreasonable and discriminatory water rates. Appellee's allegation was based on the fact that the city of Tallmadge, which also purchases its water in bulk from appellant, paid the Akron rate plus ten percent, while appellee paid the Akron rate plus as much as one hundred five percent.[2]

Fairway Manor obtained the relief it sought by court order issued April 14, 1983. The case proceeded to trial on appellant's third-party complaint and appellee's counterclaim. The trial court found that the rates charged by appellant to appellee for water were not unreasonable, and that the contract was not entered into under duress. The court further found that neither party had sustained its burden of proof on the respective claims. Appellant had not proven that appellee had breached the contract, and appellee had failed to show illegal discrimination in the water rates charged by appellant. In concluding that no such discrimination had been established, the court reasoned that the markedly

higher rate charged to appellee was justified by the value of the contract to appellee, in that appellee had no alternative water source and the contract provided a stable supply for an extended number of years. The court refused to rescind the contract, and no damages were awarded to either party. In effect, the parties were left in the same position in which they were found, except that appellee was ordered to release to appellant the quarterly payment, with its accrued interest, which appellee had, to protest the water rates, placed in escrow.

Upon appeal, the court of appeals reversed and remanded, holding that the trial court erred in considering the inability of appellee to obtain water elsewhere as a factor in its analysis of whether the rate charged by appellant was discriminatory. The appellate court remanded the cause for a determination of whether the difference between the rate charged to Tallmadge and the rate charged to appellee is unjustly discriminatory. The trial court, in making this determination, was instructed not to consider appellee's lack of an alternative water source.[3]

On remand, no further evidentiary hearing was held. The parties submitted their arguments to the court based on the evidence previously adduced. In again concluding that the rate in question was not discriminatory, the court found that the difference in rates was justified by the difference in status between appellee and the city of Tallmadge. By virtue of its superior status as a party with a definitive written contract, appellee enjoyed the benefits of stability which Tallmadge, having no long-term contract with appellant, did not possess. These benefits included a long-term fixed rate schedule and the ability to plan water operations for years in

advance. Thus, the rates, though different, were not discriminatory.

Appellee appealed to the court of appeals, which again reversed the judgment of the trial court. The appellate court held that the benefits received by appellee as a result of the water contract cannot alone justify a discrimination in rates. The court emphasized the lack of any evidence in the record tending to show that appellant encounters "additional expense or difficulty attributable to the benefits that it provides to * * * [appellee]."

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Max Rothal, director of law, and *Pamela A. Walker, Thompson, Hine & Flory, Leslie W. Jacobs* and *James B. Niehaus*, for appellant.

Vorys, Sater, Seymour & Pease, Duke W. Thomas and *Scott M. Doran*, for appellee.

DOUGLAS, J. A municipally owned public utility is exempt from restriction or regulation by the General Assembly. Section 4, Article XVIII, Ohio Constitution; *Swank v. Shiloh* (1957), 166 Ohio St. 415, 2 O.O.2d 401, 143 N.E. 2d 586, paragraph one of the syllabus. The degree of control which the courts will exert over such public utilities is strictly limited to protecting *residents of the municipality* from the imposition of rates which are unreasonable or which discriminate among such residents, taking into account their situation and classification. *State, ex rel. Mt. Sinai Hosp., v. Hickey* (1940), 137 Ohio St. 474, 477, 19 O.O. 159, 161, 30 N.E. 2d 802, 804.[4] The question presented by the instant

cause is: To what extent will a court review the rates charged by a municipally owned public utility to an extraterritorial purchaser when those rates are contained in a contract negotiated between the parties?

Appellee and the court of appeals both rely on *Western Reserve Steel Co. v. Cuyahoga Heights* (1928), 118 Ohio St. 544, 161 N.E. 920, for the proposition that a rule against discrimination applies to rates fixed by contract. In so construing *Western Reserve*, a major distinguishing feature is overlooked. In that case, the village of Cuyahoga Heights, which purchased its water from the city of Cleveland, unjustly discriminated against one of its own resident consumers. This court held that "[i]t is the duty of a municipality which undertakes to supply water *to its public* to do so without discrimination. * * * The municipality cannot absolve itself of such duty by a contract to which the person sought to be discriminated against and to whom it owes the duty is not a party." (Emphasis added.) *Id.* at paragraph one of the syllabus.

By contrast, the case before us does not involve the duty of a municipality to its own public. The dispute herein is between two separate and distinct governmental entities, a municipality and a county. No question is presented of a municipality's duty to its own residents. Therefore, *Western Reserve* is inapposite.

Courts must presume that the language of a contract between competent persons accurately reflects the intentions of the parties. *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E. 2d 411, paragraph one of the syllabus. The purpose of this presumption is to protect a right considered basic in our society: the right to freely contract. A necessary means

of preserving this right is the long-standing tradition of judicial reluctance to reform or rescind a contract absent a compelling reason to do so.

In support of its contention that the rate in question is discriminatory, appellee emphasizes two points: the difference between the rates charged to the city of Tallmadge and those charged to appellee, which are both wholesale bulk water purchasers, and the absence of any additional expense or difficulty encountered by appellant in supplying water to appellee as compared to Tallmadge. Thus, appellee contends, Tallmadge and appellee are similarly situated customers charged different rates for no logical or equitable reason. Therefore, the difference in rates constitutes impermissible discrimination. We cannot agree.

Where water rates are set forth in a contract, the fact that the rates contained therein are higher than those charged to similarly situated customers in the same class does not constitute a basis for judicial reformation of the contract. In such cases, it will be presumed that the higher rates were arrived at through the normal give and take of contractual negotiation. The lack of any cost differential to the seller does not affect the validity of the contractual rate. Even where no factor exists which would justify a difference in the rate charged, the court must leave the parties with their bargain.

If appellee is dissatisfied with the rates charged by appellant, appellee must be reminded that it entered the bargaining process freely and without duress. The trial court specifically found that appellee brought to the bargaining table persons who were qualified to exercise informed judgment in the negotiation of this particular contract.

Given these facts, this court will not interpose its judgment by rescinding or even reforming the contract. This position stems primarily not only from the belief that the parties should live with their bargain, but also from the realization that no other course of action is reasonably practicable. Our review of the possible alternative approaches to this case has compelled us to conclude that those approaches are completely unworkable, as will be seen from the following discussion.

Appellee's proposed solution, affirmance of the judgment of the court of appeals, is unacceptable. We cannot endorse the holding of the appellate court that discrimination in rates may not be based on the value of the service to the customer. The customer's desire and need for the product is always a factor in determining price. There is nothing inherently unfair in permitting this factor to be utilized in the negotiation process. Nor do we agree with the reasoning of the appellate court that the difference in rates may be justified only by a difference in the cost of supplying the service. Many other factors may justify a difference in rates. But where a particular rate is fixed by contract, it is for the parties, not the courts, to determine the rate to be charged. In such matters, courts will presume the wisdom of the bargain and uphold the contract.

An order remanding this cause, yet again, to the trial court would certainly serve no useful purpose. The trial court has already found that the contract in question was entered into freely and without duress. No other evidence could conceivably be relevant.

But the real dilemma presented by the court of appeals' disposition of this cause is its practical implications. By reversing the trial court's order upholding the contract, the appellate court necessarily struck down the contract, or at least that part of the contract which set forth water rates. Included in the judgment of the court of appeals was an order remanding the cause to the trial court "for further proceedings according to law on the other relief sought by * * * [appellee]." A question arises as to the course of action the trial court is expected to take in the face of such an order. Obviously, the court of appeals meant that the trial court should enter judgment for appellee and proceed to consider what relief is appropriate.

If the trial court enters judgment for appellee, then what relief is available? Appellee prayed that the "written agreement of May 19, 1979, be ordered cancelled and rescinded, that the Court grant a preliminary and permanent injunction enjoining * * * [appellant] from terminating water service to * * * [appellee], and that the Court order the parties to abide by the terms of the [previous] May, 1972, water agreement until such time as a reasonable, nondiscriminatory contract is negotiated by the parties in accordance with the final order of the Court and for any further relief the Court deems necessary and proper."

Basically, appellee is asking that appellant be ordered to supply water to appellee under the terms set forth in the 1972 contract until a new, acceptable contract (*i.e.*, acceptable to appellee) can be executed. The end result would be that appellant will be forced to supply water to appellee on terms other than those bargained for by the parties. This result cannot be countenanced.

Municipally owned public utilities have no duty to sell their products, including water, to extraterritorial purchasers absent a contractual obligation. *State, ex rel. Indian Hill Acres, Inc., v. Kellogg* (1948), 149 Ohio St. 461, 37 O.O. 137, 79 N.E.2d 319, paragraph three of the syllabus. Even where there is a contract, but the contract provides no termination date, either party to the agreement may terminate it upon reasonable notice. *Grandview Heights v. Columbus* (1963), 174 Ohio St. 473, 23 O.O. 2d 117, 190 N.E. 2d 453, paragraph two of the syllabus. Thus, it can be seen that a municipality does not assume a duty to continue supplying water in perpetuity to extraterritorial customers merely by virtue of having once agreed to supply it. This court has further held that the General Assembly is without power to require a municipality to furnish water to noninhabitants or to limit the price the municipality may charge for such service. *State, ex rel, McCann, v. Defiance* (1958), 167 Ohio St. 313, 4 O.O. 2d 369, 148 N.E. 2d 221, paragraph two of the syllabus. The municipality has the sole authority to decide whether to sell its water to extraterritorial purchasers. *Indian Hill Acres, supra*, paragraph two of the syllabus.

By granting appellee's prayer for relief, the trial court would be terminating the 1979 contract and forcing appellant to sell under the terms of the 1972 contract. This it cannot do. By terminating the 1979 contract, the court would absolve appellant of all duties thereunder, including the duty to supply water to appellee. Appellee cannot then request that appellant's duty to supply water be resurrected by compelling appellant to perform under the 1972 contract. In essence, this would be requiring appellant to sell water to appellee, and at a price dictated by appellee.

The remaining alternative remedies are equally unworkable. For example, if the trial court were to preserve the 1979 contract but strike down the rates contained therein as discriminatory, then what is the result? New rates would have to be determined. This poses yet another dilemma: Who sets the new rates? The court itself is not in a position to decide an appropriate rate. " * * * [A] court may not engage in rate-making since this is a legislative function." 12 McQuillin, Municipal Corporations (3 Ed. Rev. 1986) 616, Section 35.37a. Even if a court were to undertake to set the rates for these parties, it has not been explained how that is to be accomplished. Appellee repeatedly points to the Tallmadge rate in an attempt to highlight the alleged unfairness of its own rate. Should the trial court therefore order that the Tallmadge rate be paid by appellee, or that appellee's rate be paid by Tallmadge? Or does the court resort to a "compromise verdict" by setting the rate somewhere in the middle? These alternatives are obviously untenable. If the 1972 rates are forced on appellant, appellant would be compelled to continue to supply water at rates to which it has not agreed, thereby stripping appellant of all its discretionary authority over its own water supply. This court has previously refused to compel a municipality to continue to supply water to non-residents under the terms of an expired contract, on the basis that the council of the municipality has the sole authority to decide whether it would continue to furnish its surplus water to surrounding territories. *Indian Hill Acres, supra.*

Ordering the parties to renegotiate is certainly not a realistic alternative. Again, the problem arises of compelling appellant to continue supplying water under terms other than those to which it had agreed. Other problems inevitably present themselves. What rate

prevails while the contract is being negotiated? How can the parties be *forced* to come to a meeting of the minds?

It can readily be seen from the foregoing that judicial interference in these kinds of contract disputes creates many more problems than it solves. The only sensible, practical and logical solution is simply to leave the parties with their bargain. It is neither harsh nor unfair to require appellee to abide by the terms of the agreement for which it bargained. Appellee cannot be relieved of its obligations under this contract merely because it now believes that the bargain it made was a bad one.

Moreover, we are mindful of the extreme ramifications which would follow from an order requiring appellant not only to continue to sell its surplus water to appellee, but at a price to which appellant has not agreed. Such an outcome would cast uncertainty on every similar contract throughout the state where the supplier charges a higher rate to extraterritorial purchasers, or differing rates to non-residents in different contracting districts. We are unwilling to take such a step.

Accordingly, we hold that where rates for water from a municipally owned public utility are set forth in a contract, such rates will not be struck down as discriminatory even where no factor exists which could justify the rate discrimination. Therefore, evidence that the water supplier encounters no additional cost or difficulty in selling the water to the party challenging the rates has no bearing on the validity of those rates.

In conclusion, based on the foregoing, the judgment of the court of appeals is reversed and the judgment of the trial court is reinstated.

Judgment reversed.

MOYER, C.J., SWEENEY, WRIGHT, and YOUNG, J.J., concur.

LOCHER and HOLMES, JJ., concur in judgment only.

YOUNG, J., of the Tenth Appellate District, sitting for H. BROWN, J.

---

[1] Appellant denominated this pleading as a third-party complaint. However, with respect to appellee, the pleading would more properly be designated a cross-claim, since appellee was a co-party defendant with appellant in the original complaint. See Civ. R. 13(G) and 14(A).

[2] Although, in its brief to this court, appellee cites the figure of one hundred five percent as the highest effective charge under the contract, an exhibit filed by appellee in the trial court reflects an outside figure of one hundred fourteen percent. The exhibit also reflects effective rates of less than one hundred five percent.

[3] This opinion is reported at (1983), 13 Ohio App. 3d 233, 13 OBR 285, 468 N.E. 2d 927.

[4] We are aware that this rule is set forth in somewhat broader language in the decision cited as authority therefor. Specifically, the court stated that "[t]he only general restraints imposed on the distribution of water are that the rates charged be reasonable and that there be no unjust discrimination among the customers taking into account their situations and classification." *State, ex rel. Mt. Sinai Hosp., v. Hickey*

(1940), 137 Ohio St. 474, 477, 19 O.O.159, 161, 30 N.E. 2d 802, 804. However, it is clear from the context of the case that this rule was restricted to a municipality's distribution of water among its own residents. The ordinances under review in *Mt. Sinai* were concerned solely with water distribution within the territorial limits of the municipality in question. We believe the above-quoted rule must be interpreted within the context of the facts of that case.

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

This cause, here on appeal from the Court of Appeals for Summit County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed and judgment of the trial court is reinstated consistent with the opinion rendered herein.

It is further ordered that the appellant recover from the appellee its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Summit County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

/s/ THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 13th day of April, 1988.

MARCIA J. MENGEL, CLERK
/s/ Rita A. Jackson, DEPUTY

REHEARING ENTRY OF THE SUPREME COURT OF OHIO

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

/s/ THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 25th day of May, 1988.

MARCIA J. MENGEL, CLERK
/s/ Rita A. Jackson, DEPUTY

MOTION FOR REHEARING

(Filed April 22, 1988)

MOTION

The Appellee, County of Summit, respectfully moves for a rehearing of this cause pursuant to Rule IX of the Rules of Practice of the Supreme Court of Ohio so that the reversal of the judgment of the court of appeals may be vacated and set aside for the following reasons.

Respectfully submitted,

/s/ Kent M. Graham
General Counsel
County of Summit
175 South Main Street
Akron, Ohio 44308
(216) 379-2519

/s/ Kerry Bruce
Legal Counsel
Dept. of Environmental Services
25 North Main Street
Akron, Ohio 44308
(216) 379-2404

Attorneys for Appellee

MEMORANDUM IN SUPPORT

Paragraph 2 of the syllabus in this Court's decision in *Fairway Manor, Inc. v. Board of Commissioners of Summit County* (1988), 36 Ohio St. 3d 123 (decided April 13, 1988), states:

> Where rates for water from a municipally owned public utility are set forth in a contract, such rates will not be struck down as discriminatory even where no factor exists which could justify the rate discrimination.

This holding is correct to the extent that federal and state equal protection claims are not raised by the party claiming discrimination and are not treated by the lower courts. In the *Fairway Manor* case, however, appellee argued its constitutional rights under the United States and Ohio constitutions in the trial and appellate courts and, thus, has not waived its right to present equal protection arguments before this Court.

The written federal and state equal protection arguments were presented in appellee's trial brief to the common pleas court, in its first appeal of the trial court decision (assignment of error #1), in its brief on remand to the trial court and in its appeal of the remand decision (assignment of error #3). The reason for not specifically reciting to the Court the long list of cases which define permissible and prohibited discrimination is that appellee was satisfied with the application of equal protection standards by the court of appeals. Since appellant did not raise the issue in its brief, it apparently accepted the appellate court's equal protection criteria and was simply arguing whether or not the facts of the case supported the conclusion that its discrimination was prohibited. Under these circumstances, it was sufficient to cite only those cases in which this Court has ruled that unjustified discrimination in municipal rates is unlawful.

It seems beyond question that equal protection was overlooked by the Court in the *Fairway Manor* decision.

The author of the opinion has in the past six months written two other majority opinions in which equal protection under both the United States and Ohio constitutions has been extensively discussed. *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St. 3d 54, *Lyle Construction, Inc. v. Division of Reclamation* (1987), 34 Ohio St. 3d 22.

In both cases, the Court applied the rational basis test to determine if the classification which produced the disputed discrimination furthered a legitimate legislative objective. This standard is grossly at odds with the result in the instant case which upheld discrimination even where no factors could be produced to justify it. Clearly, the Court was not treating appellee's claim as one governed by the equal protection requirements of the United States and Ohio constitutions.

It goes without saying that the issue in the present case is subject to federal and state equal protection. The U.S. Supreme Court has specifically held that a federal question exists in appellant's actions outside its territorial boundaries. *Cuyahoga River Power Company v. City of Akron* (1916), 240 U.S. 462. In that case, the City of Akron passed an ordinance to appropriate water rights and build a dam which would have damaged plaintiff's ability to generate hydroelectric power. Justice Holmes, writing for the Court, held that appellant's acts were to be regarded as state action which was subject to the 14th Amendment to the United States Constitution.

The Ohio Constitution provides no less protection.

Both the Constitution of the United States (Fourteenth Amendment) and the Constitution of Ohio (Section 2, Article I) provide for "equal protection."

> Simply calling a group of persons selected for special legislative treatment a class does not satisfy the requirements of equal protection. However, the foregoing constitutional provisions do not prohibit all class legislation. They do require that such legislation must apply alike to all persons within a class, and reasonable grounds must exist for making a distinction between those within and those without a designated class.
> *Porter v. Oberlin* (1965), 1 Ohio St. 2d 143 at 151-152

Had the Court been aware of appellee's equal protection claims, it would have applied the tests to determine if the water rate discrimination was justified. Further, appellee believes that the Court would not have made a distinction that appellant was serving a customer outside its city limits or that a written contract existed since neither the United States nor Ohio constitutions waive equal protection requirements in such cases.

A rehearing is necessary to allow the Court to consider the constitutional aspects of this case which appellee has argued beginning with the trial court and which were applied by the court of appeals. Without a rehearing, this case will stand for the proposition that equal protection does not apply to municipalities supplying water outside their borders. To appellee's knowledge, such a holding would be unique to the fifty states and would certainly be in conflict with the U.S. Supreme Court's decision in *Cuyahoga River Power Company v. City of Akron* (1916), 240 U.S. 462.

If a rehearing is granted, appellee would also like to point out several factual mistakes in the Court's decision. The opinion states that *Western Reserve Steel Co. v. Cuyahoga Heights* (1928), 118 Ohio St. 544 only

prohibited discrimination against a city's own residents. In contrast, the language of *Western Reserve* specifically binds the City of Cleveland to serve the Village of Cuyahoga Heights without discrimination.

> When the city of Cleveland, under the power conferred upon it by the Constitution, entered into a contract to deliver water to the village of Cuyahoga Heights and its public, its status with reference to the public of the village differed from the status of a private corporation obtaining a franchise from a village to perform the same service only in the fact that a municipality, in such situation, has not been declared by statute to be a public utility and probably is not subject to regulation and supervision by the Public Utilities Commission of Ohio. Any provision in its contract with the village which would be void or voidable because of its being unlawful or unreasonably discriminatory if contained in the franchise of a private corporation will be void or voidable as to the public of the village.
> 118 Ohio St. 544 at 550

This holding is further reinforced by the first sentence of paragraph three of the syllabus in *State ex rel. Indian Hill Acres, v. Kellogg* (1948), 149 Ohio St. 461 which states:

> In the sale and delivery of surplus products of a municipal utility to others than the municipality and its inhabitants, the municipality is authorized to bind itself by a contract whereby it dedicates itself to the public served and assumes the duty to supply such product without discrimination.
> 149 Ohio St. 461.

The Court should review whether its intent in the present case was to overrule the decisions in *Western Reserve*, *supra* and *Indian Hills*, *supra* cases.

The opinion also mistakenly states that appellee's prayer for relief would require this Court to terminate the 1979 agreement and reinstitute the 1972 agreement. A review of appellee's counterclaim against the appellant will reveal that the described relief was requested only in the cause of action alleging duress. That claim is not before this Court. The cause of action which sets for appellee's equal protection claim requests damages and an injunction against "any and all future discriminatory and unreasonable rate increases." This measure of relief is not beyond the Court's scope to award.

In conclusion, a rehearing is necessary to resolve the constitutional issues surrounding appellee's claim. It is clear that the opinion in the present case neither applied the applicable equal protection standard to the water rate discrimination nor cited any reason why constitutional protection would not be afforded to appellee. In light of the U.S. Supreme Court decision which holds that such protection is available and the confusion which may result if prior inconsistent decisions of this Court are not overruled, a further review is warranted.

Respectfully submitted,

/s/ Kent M. Graham
General Counsel
County of Summit
175 South Main Street
Akron, Ohio 44308
(216) 379-2519

/s/ Kerry Bruce
Legal Counsel
Dept. of Environmental Services
25 N. Main Street
Akron, Ohio 44308

Attorneys for Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Rehearing was placed in the U.S. Mail this 22nd day of April, 1988 addressed to: Leslie W. Jacobs and James B. Neihaus, Thompson, Hine and Flory, 1100 National City Bank Bldg., Cleveland, OH 44114 and Harold K. Stubbs and Pamela A. Walker, City of Akron, 161 South High Street, Suite 202, Akron, OH 44308, Attorneys for Appellant.

/s/ Kerry Bruce
Attorney for Appellee

FILED
NOV 23 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-596

IN THE

Supreme Court of the United States

October Term, 1988

COUNTY OF SUMMIT,
Petitioner,

vs.

CITY OF AKRON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

LESLIE W. JACOBS*
JAMES B. NIEHAUS
THOMPSON, HINE AND FLORY
1100 National City Bank Building
Cleveland, Ohio 44114
(216) 566-5500

MAX ROTHAL
Director of Law

PAMELA A. WALKER
Assistant Director of Law
161 South High Street
Suite 202
Akron, Ohio 44308
Attorneys for Respondent

* *Counsel of Record*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

I.

QUESTIONS PRESENTED

1. Whether this Court will review a decision of a state court on grounds neither presented to nor decided by the state court.

2. Whether a municipality may assert a Fourteenth Amendment equal protection claim against another municipality from which it purchases water pursuant to a written contract.

TABLE OF CONTENTS

QUESTIONS PRESENTED I

TABLE OF AUTHORITIES III

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT..... 4

REASONS FOR DENYING THE WRIT

I. The Federal Question Which Petitioner Seeks to Present for Review by This Court Was Not Considered or Decided by the Supreme Court of Ohio 5

II. No Court Has Recognized the Constitutional Right Asserted by Petitioner 8

III. The Decision of the Court Below Does Not Conflict with Prior Decisions of This Court 10

IV. The Decision of the Court Below Does Not Present an Unresolved Issue Concerning the Breadth of Fourteenth Amendment Protection 12

CONCLUSION..... 14

APPENDIX:

Findings of Fact and Conclusions of Law of the Court of Common Pleas A1

Charter of the County of Summit A4

TABLE OF AUTHORITIES

Cases

Aiken Industries, Inc. v. Estate of Wilson, 383 A.2d 808 (Pa. 1978), *cert. denied*, 439 U.S. 877 7

American Surety Co. v. Baldwin, 287 U.S. 156 (1932) 7

Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980) 8

Cardinale v. Louisiana, 394 U.S. 437 (1969) 6

City of Moore v. Atchinson, Topeka & Santa Fe Railway Co., 699 F.2d 507 (10th Cir. 1983) 8

City of New York v. Richardson, 473 F.2d 923 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973) 8

City of South Lake Tahoe v. California Tahoe, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980) 9

City of Texarkana v. Wiggins, 246 S.W.2d 622 (Texas 1952) 12

Cuyahoga River Power Co. v. City of Akron, 240 U.S. 462 (1916) 10,11

Delta Special School District No. 5 v. State Bd. of Education, 745 F.2d 532 (8th Cir. 1984) 8

Godchaux Co. v. Estopinal, 251 U.S. 179 (1919) 7

Hansen v. City of Buenaventura, 729 P.2d 186 (Cal. 1986) 12

Hanson v. Denckla, 357 U.S. 235 (1958) 7

Heath v. Alabama, 106 S. Ct. 433 (1985)..... 6

Herndon v. Georgia, 295 U.S. 441 (1935)..... 7

McCorquodale v. State of Texas, 211 U.S. 432 (1908) 7

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985)..... 10,11

Newark v. New Jersey, 262 U.S. 192 (1923)..... 8

Orr Felt Co. v. Piqua, 443 N.E.2d 521 (Ohio 1983)..... 2

Radio Station WOW Inc. v. Johnson, 326 U.S. 120 (1945)..... 7

South Macomb Disposal Authority v. Township of Washington, 790 F.2d 500 (6th Cir. 1986) .. 9,10,12,13

State v. Rinehart, 283 N.W.2d 3219 (Iowa), *cert. denied*, 444 U.S. 1088 (1979)..... 6

State ex rel. Mt. Sinai Hospital, v. Hickey, 30 N.E.2d 802 (Ohio 1940)..... 2

Tacon v. Arizona, 410 U.S. 351 (1973)..... 6

Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049 (5th Cir. 1984)..... 9

Township of River Vale v. Town of Orangetown, 403 F.2d 684 (2d Cir. 1968) 12,13

Trenton v. New Jersey, 262 U.S. 182 (1923)..... 8

Village of Arlington Hts. v. Regional Transportation Authority, 653 F.2d 1149 (7th Cir. 1981) 9

Water Works Bd. of Birmingham v. Barnes, 448 So. 2d 296 (Ala. 1983) 12

Webb v. Webb, 451 U.S. 493 (1981)..... 6

Whitney v. California, 274 U.S. 357 (1927) 6

Williams v. Mayor of Baltimore, 289 U.S. 36 (1933) 8

CONSTITUTION

U.S. Const. amend. XIV, §1 ..... *passim*

No. 88-596

IN THE

Supreme Court of the United States

October Term, 1988

COUNTY OF SUMMIT,
Petitioner,

vs.

CITY OF AKRON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves a contract dispute between two municipal government entities in the State of Ohio.

The City of Akron operates a water system. Under Ohio law it has no obligation to sell water to any purchaser outside the city (Pet. App. at 1a). The City of Akron agreed to sell water to two other municipal

entities. In one instance the City of Tallmadge purchases its water from Akron on an open market basis with no guarantees of a continued supply, of a controlled price or of any particular terms of sale. In the other instance the petitioner, Summit County, negotiated for and obtained a long-term contract with Akron under which it has secured a continuing water supply for years with a fixed rate schedule. The contract rate to Summit County has always been higher than the open market price to the City of Tallmadge. Summit County has challenged its contract rate in this case.

The trial court made unchallenged findings that "The City of Akron engaged in no unscrupulous, excessive, or immoderate conduct in the negotiation or enforcement of the subject contract" (App. at A2, ¶10) and that "The County was not forced to sign the 1979 water agreement against its will or better judgment" (*id.* at ¶6). The trial court also made a finding, affirmed on appeal without further review, that "The rates charged by the City of Akron to the County of Summit for water are not unreasonable" (*id.* at ¶11; 468 N.E.2d 927, 930 ____ [1983]). The trial court was, therefore, also able to make consistent unchallenged conclusions of law that "The contract was not entered into under duress by either party" and that "Neither the negotiation process or [sic] the contract itself are [sic] unconscionable" (App. at A3, ¶¶3, 5).

There is no dispute that Ohio law provides that rates charged by a municipality for water must be reasonable and must not unjustly discriminate among the customers served, taking into account the customers' situations and classifications.[1] With a conclusive determination that the rates were reasonable, the *only* substantive issue

[1] *State, ex rel. Mt. Sinai Hospital, v. Hickey*, 30 N.E.2d 802 (Ohio 1940); *Orr Felt Co. v. Piqua*, 443 N.E.2d 521 (Ohio 1983).

presented to the Supreme Court of Ohio was one of state common law, namely whether the difference between the open market rate to one customer and the long-term contract rate to another was an unjust discrimination. That court held that freely negotiated, reasonable contract rates "will not be struck down as discriminatory" as a matter of state law, and it reversed the lower court on that ground.

Summit County had not sought to affirm the lower court on the basis that a reversal would constitute a denial of equal protection. No constitutional question was either briefed or argued. Instead, the petitioner briefed and argued only four propositions in the Supreme Court of Ohio. The first was a procedural point concerning the prior appeals in the lower courts, and all three of the other arguments addressed the discrimination issue as a matter of state common law.

Following the Supreme Court of Ohio's decision (Pet. App. at 1a) and entry of judgment (Pet. App. at 13a), Summit County for the first time sought to have that Court consider an equal protection argument by filing a Motion for Rehearing (Pet. App. at 15a). Rehearing was summarily denied (Pet. App. at 14a), and, as a consequence, the dilatory constitutional issue was not addressed on the merits. The petitioner now seeks to have this Court agree to review an issue that was never properly before the court to which the writ would be issued.

SUMMARY OF ARGUMENT

This Court is without jurisdiction to hear petitioner's federal equal protection claim because petitioner did not properly raise that issue in the state court below nor did that court address the issue. This Court has long maintained that it will not decide federal questions which are not presented to or decided by the highest state court.

In addition to the jurisdictional deficiencies, petitioner has failed to premise its argument on any recognized constitutional right. It is well-established that a municipality has no Fourteenth Amendment rights against its creator state, and likewise it has no Fourteenth Amendment rights against another political subdivision of that state. This conclusion is not in conflict with any prior decision of this Court or of any other federal or state court.

REASONS FOR DENYING THE WRIT

I. The Federal Question Which Petitioner Seeks to Present for Review by This Court Was Not Considered or Decided by the Supreme Court of Ohio.

Petitioner contends that the Supreme Court of Ohio's decision below is in conflict with the equal protection clause of the Fourteenth Amendment. Petitioner has accordingly sought to invoke this Court's jurisdiction under 28 U.S.C. §1257, which provides that a final judgment of the highest court of a state may be reviewed by the Supreme Court by writ of certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States." In accordance with long established precedent, this Court should decline to accept jurisdiction because the Supreme Court of Ohio never considered petitioner's constitutional claim, nor was it given a proper opportunity to do so.

Although the petitioner referred to an equal protection issue in the lower courts of Ohio, the case was ultimately decided at both the trial court and intermediate appellate court on state law principles. On respondent's motion to certify the record in the Supreme Court of Ohio, no state or federal constitutional question was suggested by either party. Following that court's certification, both parties confined their briefs and oral arguments to issues of state common law, and petitioner made no claims or assertions under the Fourteenth Amendment. In reaching its decision, the Supreme Court of Ohio resolved questions of state law only and, quite understandably, did not address any hypothetical state or federal constitutional questions that neither party had presented.

Having chosen unsuccessfully to rely on its erroneous view of state law and to forego an argument based on constitutional limitations, petitioner then sought a rehearing on the previously omitted grounds that the rate differential between Summit and Tallmadge is violative of the equal protection clause of both the Fourteenth Amendment and the Ohio constitution. The court summarily denied the motion for a rehearing. Petitioner is now attempting to characterize the denial of rehearing as if the court had explicitly declined to address constitutional arguments presented in a timely manner.

This Court has consistently adhered to the principle that it is without jurisdiction to decide federal constitutional issues which have not been adequately presented in the state system. *See, e.g., Heath v. Alabama*, 106 S. Ct. 433, 436 (1985); *Webb v. Webb*, 451 U.S. 493, 496 (1981); *Tacon v. Arizona*, 410 U.S. 351 (1973); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Whitney v. California*, 274 U.S. 357, 360 (1927); *State v. Rinehart*, 283 N.W.2d 319 (Iowa), *cert. denied*, 444 U.S. 1088 (1979). In addition to the jurisdictional statute, 28 U.S.C. §1257, there are sound reasons for this limitation. It requires the parties to develop a sufficient record, and if there are independent state grounds to pretermit the federal issue, the state court can identify and act upon them in an authoritative manner. This Court has additionally explained that:

> If the parties to state court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our workload this is a very substantial matter.

Webb v. Webb, supra, 451 U.S. at 500.

Petitioner's last minute attempt in its motion for rehearing to raise an equal protection claim does not, and cannot, qualify as an adequate state presentation of that claim sufficient to invoke this Court's jurisdiction. "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing comes too late, unless the court actually entertains the question and decides it." *Herndon v. Georgia*, 295 U.S. 441, 443 (1935). *Accord, Hanson v. Denckla*, 357 U.S. 235, 244 (1958); *Radio Station WOW Inc. v. Johnson*, 326 U.S. 120, 128 (1945); *American Surety Co. v. Baldwin*, 287 U.S. 156, 163 (1932); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); *McCorquodale v. State of Texas*, 211 U.S. 432, 437 (1908).

Nothing had prevented petitioner from presenting its constitutional claim in a timely manner. Because petitioner was faced with an appellate dead end when the Supreme Court of Ohio did not entertain its motion for rehearing, it was no doubt ill-advised in keeping that claim in reserve. Moreover, it cannot be said that the equal protection issue arose only after an unanticipated ruling of the Ohio courts made rehearing the first opportunity to raise the issue. *See Herndon v. Georgia, supra*, 295 U.S. at 443-44; *Aiken Industries, Inc. v. Estate of Wilson*, 383 A.2d 808 (Pa. 1978), *cert. denied*, 439 U.S. 877 (1978) (Blackman, *J.*, concurring). Indeed, petitioner was well aware of its argument throughout the proceedings, for it had referred to the federal equal protection clause fleetingly in its arguments to the trial and intermediate appellate courts. The general rule accordingly applies, and petitioner is foreclosed from now asserting any argument arising out of the Fourteenth Amendment's equal protection clause. With no federal question available for review, this Court should deny the petition.

II. No Court Has Recognized the Constitutional Right Asserted by Petitioner.

Petitioner has attempted to create a constitutional right where none exists. Its first two contentions regarding the Supreme Court of Ohio's limitations of equal protection rights by city limits and waiver presume that a municipality actually has Fourteenth Amendment equal protection rights against another municipality. Such a presumption is indeed bold and notable. No court has ever held that there is such a right, and the decisions addressing the question have all held to the contrary. Having been built on a nonexistent foundation, the entire petition is unsupportable and devoid of merit. There is no reason for this Court to entertain a question as to which there is no history of doubt.

In asserting its constitutional claim, petitioner has overlooked the debilitating fact that, as a subdivision of the State of Ohio, it cannot obtain Fourteenth Amendment protection against its creator state. It has long been held that "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933). *Accord, Trenton v. New Jersey*, 262 U.S. 182 (1923); *Newark v. New Jersey*, 262 U.S. 192 (1923). This limitation has been uniformly followed by the lower federal courts. *See, e.g., Delta Special School District No. 5 v. State Bd. of Education*, 745 F.2d 532, 533 (8th Cir. 1984); *City of Moore v. Atchinson, Topeka & Santa Fe Railway Co.*, 699 F.2d 507, 511-12 (10th Cir. 1983); *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301, 1308 (5th Cir.) (*per curiam*), *cert. denied*, 449 U.S. 1015 (1980); *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973).

The principle preventing a municipal corporation from invoking the protection of the Fourteenth Amendment against the state similarly prevents a municipality from asserting such rights against another subdivision of the same state. The federal courts of appeal have consistently foreclosed a political subdivision of a state from challenging the acts and ordinances of any political subdivision in the same state on either due process or equal protection grounds. *See, e.g., South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500, 505 (6th Cir. 1986); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984); *Village of Arlington Hts. v. Regional Transportation Authority*, 653 F.2d 1149, 1153 (7th Cir. 1981); *City of South Lake Tahoe v. California Tahoe*, 625 F.2d 231, 233 (9th Cir. 1980), *cert. denied*, 449 U.S. 1039 (1980). For instance, the Court of Appeals for the Fifth Circuit in *Rapides Parish Police Jury, supra*, ruled that the town of Ball had no standing to assert that the parish's tax allocation formula contravened the Fourteenth Amendment. *Id.* at 1051 n.1. In *South Lake Tahoe, supra*, the Court of Appeals for the Ninth Circuit similarly held that the plaintiff city lacked standing to challenge on Fourteenth Amendment grounds a neighboring city's zoning plans and ordinances. *Id.* at 233.

The inability of a political subdivision to assert rights guaranteed by the Fourteenth Amendment against either its parent state or political siblings is a function of our constitutional federalism. The Fourteenth Amendment simply does not restrict or guide a political subdivision of a state in its dealings with another subdivision. "The relationship between the entities is a

matter of state concern; the Fourteenth Amendment protections and limitations do not apply." *South Macomb Disposal Authority, supra*, 790 F.2d at 505.

Petitioner's failure to cite any authority directly supporting its contentions is understandable, yet rather than recognize its position for what it is—namely a very novel one unsupported by existing law—petitioner has brazenly attempted to convince the Court that an established right has been violated. As the authorities demonstrate, however, petitioner has no equal protection rights as against respondent. Petitioner is a governmental entity, and as a county it is a subdivision of the State of Ohio. Further, as Ohio's only "charter county," petitioner has invoked the state's constitutional authorization to become a municipal corporation (App. at A4). The law is neither ambiguous nor uncertain that a municipality has no Fourteenth Amendment protection vis-a-vis another municipality. Thus, petitioner cannot invoke the equal protection clause against respondent. Consequently, there is no federal question before this Court, and the Court should deny the petition.

III. The Decision of the Court Below Does Not Conflict with Prior Decisions of This Court.

Petitioner has cited a number of decisions from this Court and state courts which are supposedly in conflict with the decision below by the Supreme Court of Ohio. Even a cursory examination reveals that there is no such conflict.

Petitioner relies on two prior decisions of this Court in arguing that the Ohio court has rewritten constitutional law: *Cuyahoga River Power Co. v. City of Akron*, 240 U.S. 462 (1916); *Metropolitan Life Ins. Co. v.*

Ward, 470 U.S. 869 (1985). Even assuming *arguendo* that petitioner's description of the Ohio court's disposition of this case is accurate,[2] those two decisions are inapposite and present no conflict of authority.

Cuyahoga River Power Co., supra, stands for the unremarkable proposition that a municipality's appropriation of a private corporation's property is subject to the Fourteenth Amendment. The Court did not address the use of the Fourteenth Amendment by one municipal corporation against another, nor did it consider whether any protections were offered by the equal protection clause to a municipality. Indeed, the decision did not even turn upon the equal protection clause.

In *Metropolitan Life Ins. Co. v. Ward, supra*, this Court was confronted with a state tax which discriminated against nonresidents. The rights of nonresident individuals were pitted against the right of the state to promote in-state business. By way of distinction, rights of individuals are not at issue in this case, nor is there any allegation of discrimination between residents and nonresidents of a state. Rather, the controversy stems from the rate disparity between two municipalities located outside the boundaries of their supplier municipality, but all three are located within the same state. There can be no question that the authority of a state to tax residents of a different state and a municipality's authority to sell water to a neighboring municipality at agreed upon terms are vastly dissimilar exercises of legislative power.

---

[2] As emphasized elsewhere in this brief, the Ohio Supreme Court did not address the Fourteenth Amendment; therefore any express conflict is impossible.

The three state supreme court decisions cited by petitioner are similarly irrelevant to the present controversy. The courts in *City of Texarkana v. Wiggins*, 246 S.W.2d 622 (Tex. 1952), *Hansen v. City of Buenaventura*, 729 P.2d 186 (Cal. 1986), and *Water Works Bd. of Birmingham v. Barnes*, 448 So. 2d 296 (Ala. 1983), all dealt with the propriety of rates charged by municipal water suppliers, but they addressed the rights of individuals only, not the rights of one municipality against a second municipality. None of those decisions involved the implications of a written contract between two municipal corporations for the sale of water. More importantly, *Texarkana v. Wiggins* and *Water Works Bd. v. Barnes* are particularly useless here because they are not premised on the Fourteenth Amendment. Both cases are merely common law utility rate cases and offer petitioner no support in its assertion of equal protection guarantees.

IV. The Decision of the Court Below Does Not Present an Unresolved Issue Concerning the Breadth of Fourteenth Amendment Protection.

Petitioner claims that there is a split among the circuits as to whether a political subdivision of a state has Fourteenth Amendment protection against another political subdivision and that the Court must address this unresolved issue. In truth, the issue is well-settled, and there is no decisional split among the courts of appeals.

Petitioner argues that *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986), conflicts with *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2d Cir. 1968). The Court of Appeals for the Sixth Circuit held in *South Macomb* that

a municipality has no rights pursuant to the Fourteenth Amendment vis-a-vis another municipality in the *same* state. The Court of Appeals for the Second Circuit held in *River Vale* that a *New Jersey* municipality could assert a Fourteenth Amendment due process claim against an abutting *New York* municipality.

Contrary to petitioner's contention, *River Vale* and *South Macomb* are obviously harmonious. The holding of *River Vale* follows from the fact that the two cities were not created by the same state. *River Vale* explicitly acknowledges and distinguishes the principle that a political subdivision cannot assert Fourteenth Amendment rights against its creator state or, by implication, another political subdivision within the creator state. Petitioner's own quote from *River Vale* makes this abundantly clear (403 F.2d at 686):

> Appellees urge that because the township is a political subdivision of the state it cannot assert rights under the due process clause, citing several cases from the Supreme Court and one from this court. None of these cases is in point. In each of them, a municipality was challenging a law of its own state.

CONCLUSION

It is apparent that petitioner's claims do not warrant or qualify for the Court's consideration. Petitioner has raised arguments to which the answers are long settled. Moreover, petitioner's equal protection claim is simply an untimely attempt to reopen a matter conclusively decided by the Supreme Court of Ohio on state law grounds. This Court is not in a position to hear a federal question never presented to the state court from which the appeal would be taken. The Court should accordingly deny the petition.

Respectfully submitted,

LESLIE W. JACOBS
JAMES B. NIEHAUS
THOMPSON, HINE AND FLORY
1100 National City Bank Building
Cleveland, Ohio 44114
(216) 566-5500

MAX ROTHAL
Acting Director of Law

PAMELA A. WALKER
Assistant Director of Law
161 South High Street
Suite 202
Akron, Ohio 44308
Attorneys for Respondent

APPENDIX

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE COURT OF COMMON PLEAS

(Filed November 8, 1982)

No. CV 81 4989

IN THE COURT OF COMMON PLEAS

FAIRWAY MANOR, INC.,
Plaintiff,

v.

BOARD OF SUMMIT COUNTY COMMISSIONERS and CITY OF AKRON,
Defendants.

Pursuant to the request of Summit County for written findings of fact and conclusions of law, the Court hereby promulgates the following:

Findings of Fact as to the Third Party Complaint of the City of Akron against the County of Summit:

1. A contract for the sale of water was entered into by the parties in May, 1979.

2. On or about January 10, 1981 the County placed into an interest bearing account those funds due the City for a quarterly water payment under the terms of the contract in the amount of $232,877.08.

3. The City at all times after the signing of the contract provided and continues to provide water to the County.

4. The County has paid all subsequent quarterly bills to the City.

Findings of Fact as to the Counterclaim of the County against the City:

1. In 1972 the City and County entered into a contract to supply water, and the County developed a water delivery system.

2. In 1977, the City of Akron gave notice of termination of the contract with the County.

3. A process of negotiation for a new contract took place over a period of two years, during which at least nine draft agreements were produced.

4. The County had no alternative sources for the purchase of water.

5. Both the City and the County were represented at each negotiation session by persons qualified and competent to make informed decisions regarding the form and substance of any contract for the sale of water.

6. The County was not forced to sign the 1979 water agreement against its will or better judgment.

7. The City of Akron charges a substantially higher rate for the sale of water to the County of Summit than it charges for the sale of water to the City of Tallmadge.

8. The City of Tallmadge has no contract with the City of Akron for the supply of water.

9. City of Akron officials reasonably believed that the City of Tallmadge might develop its own source of water at some point in the future.

10. The City of Akron engaged in no unscrupulous, excessive, or immoderate conduct in the negotiation or enforcement of the subject contract.

11. The rates charged by the City of Akron to the County of Summit for water are not unreasonable.

12. The provision of water by the City to the County constitutes consideration for the contract in question.

13. Neither the City nor the County at any time during the process of negotiation of the subject contract sought to have included a pre-termination hearing requirement.

14. The City has not overcharged the County for metering services at a pump station.

Conclusions of Law based upon the facts are:

1. The elements necessary to prove a breach of contract have not been proven by the City.

2. The water contract of 1979 is not ambiguous.

3. The contract was not entered into under duress by either party.

4. No illegal discrimination in the rates charged by the City of Akron to the City of Tallmadge when compared to the rates charged by the City to the County was proven at trial.

5. Neither the negotiation process or the contract itself are unconscionable.

6. The contract is supported by valid consideration.

7. No provision in the contract is violative of due process requirements.

8. The withheld quarterly payment must be paid by the County to the City with all accrued interest.

DONALD B. MCFADDEN
Judge

CHARTER OF THE COUNTY OF SUMMIT

[SEAL]

Adopted November 6, 1979
Amended November 3, 1981
Amended November 6, 1984

CHARTER OF THE COUNTY OF SUMMIT

PREAMBLE

The citizens of Summit County, Ohio, believing that they can better govern themselves on the county level, avail themselves of the opportunity afforded by the Constitution of the State of Ohio to adopt this Charter.

ARTICLE I

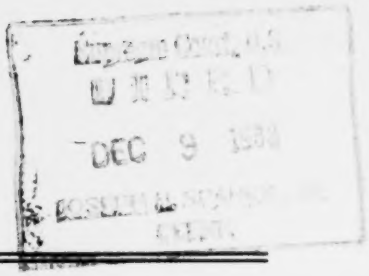
Corporate Powers, Rights and Privileges

Section 1.01. Names, Boundaries and Powers

The County of Summit, as its limits now are, or hereafter may be, shall be a body politic and corporate by the name of County of Summit with all the rights granted by this Charter and by general law.

The County is responsible for the exercise within its boundaries of all powers vested in and the performance of all duties imposed upon counties and county officers by law. In addition, the County may exercise all powers specifically conferred by this Charter or incidental to powers specifically conferred by this Charter and all other powers which the Constitution and laws of Ohio now or hereafter grant to counties to exercise or do not prohibit counties from exercising, including the concurrent exercise by the County of all or any powers vested in municipalities by the Ohio Constitution or by general law.

All powers shall be exercised and enforced in the manner prescribed by this Charter, or, when not prescribed herein, in such manner as may be provided by ordinance or resolution of the County Council, and, when not prescribed by the Charter or amendments therein or by ordinance or resolution, then such powers shall be exercised in the manner prescribed by general law.



No. 88-596

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

COUNTY OF SUMMIT, *Petitioner,*

v.

CITY OF AKRON, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITIONER'S REPLY BRIEF

KENT M. GRAHAM
175 South Main Street
Akron, Ohio 44308
(216) 379-2519

JERRY SLOAN
175 South Main Street
Akron, Ohio 44308
(216) 379-2507

Counsel of Record

KERRY BRUCE
25 North Main Street
Akron, Ohio 44308
(216) 379-2404

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT 1

CONCLUSION 6

APPENDIX

Trial Brief - County of Summit (No. 81-4-989, in part) 1a

Brief of Appellant (first appeal, No. 11169, in part) 3a

Reply Brief of Appellant (first appeal, No. 11169, in part) 6a

Brief of Appellant (second appeal, No. 12755, in part) 7a

Decision and Journal Entry of the Court of Appeals (second appeal, No. 12755) 8a

TABLE OF AUTHORITIES

Cases: Page

Akron Board of Ed. v. State Board of Ed. of Ohio, 490 F.2d 1285 (6th Cir. 1974) *cert. denied*, 417 U.S. 932 5

Board of Education v. Allen, 392 U.S. 236 (1968) . . 5

City of South Lake Tahoe v. California Tahoe, 449 U.S. 1039 (1980) 4

Herndon v. Georgia, 295 U.S. 441 (1935) 3

Neilson v. Lagow, 12 How. 98 (1851) 3

Reece v. Georgia, 350 U.S. 85 (1955) 2

South Macomb Disposal Authority v. Township of Washington, 790 F.2d 500 (6th Cir. 1986) . . . 4, 5

Township of River Vale v. Town of Orangetown, 403 F.2d 684 (2nd Cir. 1968) 4

Urie v. Thompson, 337 U.S. 163 (1949) 2

Webb v. Webb, 451 U.S. 493 (1981) 2

No. 88-596

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

COUNTY OF SUMMIT, *Petitioner*,

v.

CITY OF AKRON, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITIONER'S REPLY BRIEF

REASONS FOR GRANTING THE WRIT

I.

Respondent states in its opposing brief that the Supreme Court is without jurisdiction to hear this case because petitioner "referred to the equal protection clause fleetingly in its arguments to the trial and intermediate appellate courts" (Res. Brief at 7). These fleeting references are reproduced in the appendix to this reply brief (pp. 1a to 8a, *infra*), comprising eight pages after being edited to remove the discussion of the factual issues involved. This Court has jurisdiction to review the decision of the Ohio Supreme Court because "the record as a whole shows either expressly or by clear implication that the federal claim was adequately

presented in the state system." *Webb v. Webb*, 451 U.S. 493 at 496-497 (1981).

Respondent also emphasizes the fact that petitioner did not raise a federal issue in the Ohio Supreme Court until the motion for rehearing. There are two good reasons for this, neither of which defeats this Court's jurisdiction. First, petitioner prevailed upon the federal issue in the court of appeals and respondent failed to appeal it to the state supreme court. Second, the Ohio Supreme Court rendered a decision which unexpectedly reversed the federal issue not before the court.

The constitutional issue in question arose from petitioner's third assignment of error to the court of appeals (p. 7a, *infra*) which stated:

> The trial court erred upholding the discriminatory water rate contrary to law and the equal protection standards required by the Ohio and United States Constitutions.

The court of appeals sustained this assignment of error and remanded the case to the trial court for further proceedings (p. 11a, *infra*). Respondent accepted this holding and did not raise, argue or brief the issue in its appeal to the Ohio Supreme Court. Since the federal issue had been disposed of by the intermediate appellate court, it was not necessary for petitioner to raise the issue before the state supreme court in order to obtain review by this Court. *Urie v. Thompson*, 337 U.S. 163, 172 (1949); *Reece v. Georgia*, 350 U.S. 85, 86-87 (1955).

Unfortunately, the Ohio Supreme Court issued a syllabus and opinion containing holdings neither briefed nor argued by either party. Its decision reversed the unchallenged holding of the court of appeals and extinguished petitioner's federal equal protection rights

sub silentio. Petitioner's request for a rehearing to specifically address the denial of federal equal protection rights was refused.

Respondent maintains that petitioner has forfeited the right to seek review of this decision because it did not have the prescience to know that the Ohio Supreme Court would decide an issue not before it. Federal law is not so demanding.

> There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it.
> *Herndon v. Georgia*, 295 U.S. 441 at 444 (1935).

Nevertheless, respondent suggests that this Court has no authority to review the Ohio Supreme Court's denial of federal equal protection rights simply because that court refused to discuss federal issues. Were this true, state courts could avoid review of decisions impacting upon federal rights merely by omitting references to the issues involved. This has not been permitted in the past and should not be countenanced now. *See Neilson v. Lagow*, 12 How. 98, 110 (1851).

II.

Respondent asserts that petitioner has overlooked the fact that a political subdivision cannot obtain Fourteenth Amendment protection against its creator state. Petitioner is aware of this fact but also aware that the prohibition is based on the Eleventh Amendment and applies only to suits brought in federal court. It is respondent who has overlooked an important fact -- namely, that petitioner's claims were not raised against its creator state and were not brought in federal court.

In any event, the cases cited by respondent to support its position (Res. Brief at 9) hold only that a political subdivision cannot challenge a state statute or be challenged for acting on the basis of a state statute in federal court. In the present case, (1) petitioner was not challenging a state statute, (2) respondent was not acting on the basis of a state statute, and (3) the case was not brought in federal court. Moreover, as noted in the dissent to the denial of certiorari in *City of South Lake Tahoe v. California Tahoe*, 449 U.S. 1039 (1980), the issues raised by political subdivisions bringing federal claims in federal court are important and have received conflicting answers in the courts of appeals.

Nowhere is this conflict more obvious than in *South Macomb Disposal Authority v. Township of Washington*. 790 F.2d 500 (6th Cir. 1986) and *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2nd Cir. 1968). Both cases involved suits between political subdivisions in which Fourteenth Amendment claims were presented. The following quotes illustrate the opposite conclusions reached by the two circuits:

> We hold that a municipal corporation like any other corporation is a "person" within the meaning of the fourteenth amendment and is entitled to its protection.
> *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 at 686 (2nd Cir. 1968).

> Therefore, the Fourteenth Amendment simply does not prescribe guidelines and impose restrictions upon one political subdivision vis-a-vis another political subdivision.
> *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 at 505 (6th Cir. 1986).

The harmony between these cases alluded to by respondent is nonexistent. As further proof that the issue is not well settled, a different panel of the sixth circuit, in an earlier decision, permitted one Ohio political subdivision, the Akron Board of Education, to raise Fourteenth Amendment claims against another political subdivision, the Ohio State Board of Education:

> We have no doubt concerning the jurisdiction of the District Court to hear and decide a case asserting facts which, if true, would represent a violation of the Fourteenth Amendment.
> *Akron Board of Ed. v. State Board of Ed. of Ohio*, 490 F.2d 1285 at 1292 (6th Cir. 1974) *cert. denied*, 417 U.S. 932.

See also Board of Education v. Allen, 392 U.S. 236 (1968).

Finally, there is the concurring opinion in the case cited by respondent in support of its statement that a political subdivision has no constitutional rights against another political subdivision in federal court:

> Judge Contie holds that, because the federal constitution affords no protection to municipal corporations as against the power of the state to control them, it must therefore follow that the constitution affords no protection to a municipal corporation as against the acts of another political subdivision of the same state. In my view, this conclusion does not necessarily follow as a matter of logic because, unlike the states, municipal corporations do not enjoy Eleventh Amendment immunity under *Monell*.
> *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 at 506 (6th Cir. 1986).

Clearly, this is an area of law which is not settled with respect to the right of political subdivisions to bring federal claims against other political subdivisions in federal court. It is certainly not settled with respect to the same claims brought in state court.

CONCLUSION

The record set forth in the appendix clearly shows that petitioner's federal claim was adequately presented in the state system and, thus, is eligible for review. Petitioner was not required to brief the federal claim in the Ohio Supreme Court since the issue was not appealed to that court by respondent. When surprised by that court's decision on this issue, petitioner promptly moved for a rehearing on federal grounds. The state court's decision should be reviewed by this Court to determine if rights protected by the United States Constitution have been impermissibly denied and to resolve whether political subdivisions may assert such rights against other political subdivisions in state courts.

Respectfully submitted,

KENT M. GRAHAM
175 South Main Street
Akron, Ohio 44308
(216) 379-2519

JERRY SLOAN
175 South Main Street
Akron, Ohio 44308
(216) 379-2507

Counsel of Record

KERRY BRUCE
25 North Main Street
Akron, Ohio 44308
(216) 379-2404

Counsel for Petitioner

APPENDIX

Trial Brief - County of Summit
Summit County Court of Common Pleas
Case No. CV 81-4-989
(filed January 20, 1982)

* * *

A. THE WATER RATES CHARGED IN THE MAY 19, 1979 AGREEMENT DISCRIMINATE AGAINST THE COUNTY WITH RESPECT TO SIMILARLY SITUATED USERS IN VIOLATION OF THE EQUAL PROTECTION CLAUSES OF THE OHIO AND UNITED STATES CONSTITUTIONS.

Article I, section 2 of the Ohio Constitution states as follows:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

This section has been held to mean that all legislation must apply alike to all persons within a class and any distinctions between members of a class must be made on reasonable grounds. *State v. Buckley*, 16 Ohio St. 2d 128 (1968). Similarly, section 1 of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

> wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of the [sic] life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The constitutional provisions govern and restrict a municipality's broad authority to operate a public utility under sections 4 and 6 of Article XVIII of the Ohio Constitution.

* * *

In the present case, there are four basic classes of users comprising the Akron water system, each with its own rate:

1.	City of Akron resident customers	Akron rate
2.	Nonresident retail customers (Fairlawn, Mogadore, part of Northampton Township)	Akron rate + 60%
3.	Nonresident industrial customers (Chrysler, General Motors)	Akron rate + 50%
4.	Nonresident wholesale customers (Tallmadge, County of Summit)	Akron + 10% (Tallmadge) Akron + 105% (County of Summit)

With minor exceptions, each member of the first three classes pays the same rate as the other members of its class. However, it can be seen that the two members of the fourth class (nonresident wholesale customers) pay rates which are not even remotely similar. Tallmadge's rate of Akron + 10% is the lowest of all the nonresident users while the County's rate of Akron + 105% is the highest of all nonresident users. The constitutional

provisions quoted above require that there be reasonable grounds for such a disparity.

* * *

(Trial Brief at 14-15)

Brief of Appellant
Ninth District Court of Appeals
Case No. 11169
(filed August 29, 1983)

* * *

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN UPHOLDING AKRON'S RATE DISCRIMINATION BETWEEN TALLMADGE AND THE COUNTY SINCE IT IS NOT BASED ON THE COST OF SERVICE NOR DOES IT FURTHER A LEGITIMATE LEGISLATIVE PURPOSE.

A municipality's authority to operate a public utility is subject to the Ohio and United States constitutional restrictions against unjust discrimination. *State ex. rel. Mt. Sinai Hospital v. Hickey* (1940), 137 Ohio St. 474. These restrictions are not abrogated by Sections 4 and 6 of Article XVIII of the Ohio Constitution and cannot be avoided by contract.

* * *

Equal protection of the law is a fundamental right granted by both the Ohio and federal constitutions. The equal protection provisions of the Ohio and United States constitutions are substantially the same (Appendix 3), and Ohio courts have traditionally followed federal equal protection analysis. *Kinney v. Kaiser Aluminum and Chemical Corp.* (1975), 41 Ohio St. 2d 120. With regard to discrimination not involving suspect classifications or fundamental rights, the United States Supreme Court has employed a rationality standard. The Court will review:

1) whether the challenged distinction rationally furthers a legitimate, articulated municipal purpose; 2) whether the purpose is the one in fact intended by the legislative branch; and 3) whether that purpose is rationally furthered by the legislative means adopted. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), *McGinnis v. Royster*, 410 U.S. 133 (1973).

* * *

Given these restrictions, classifications which promote the social welfare are the most common forms of federally approved discrimination. *Richardson v. Belcher*, 404 U.S. 78 (1971).

* * *

The cases on the federal and state level demonstrate that discrimination will be permitted only where there is a difference in the cost of service or where it promotes a valid legislative purpose. Thus, the present case must be examined to determine if the admittedly discriminatory rate structure is either based on the cost of service or promotes a valid legislative purpose. If it does not fulfill either of these conditions, it cannot stand.

* * *

The effect of the trial court decision is to create a distinction between those wholesale users who might develop an alternative water source, but do not have written water contracts, and those who might not develop a water source and do have a written contract. No such reasonable objective was disclosed at trial to justify the classification. Furthermore, it does not meet the requirements established by the Ohio and United States Supreme Courts that such a classification be based upon the cost of service or upon a legitimate legislative purpose. By these standards, the trial court clearly erred in its determination that there is no illegal discrimination in the rates charged by Akron to Tallmadge and the County.

* * *

CONCLUSION

* * *

I

The federal and state equal protection clauses prohibit rate discrimination except where it is based on differing costs of service or where such discrimination furthers a legitimate legislative interest. The experts and other witnesses of both sides agreed that there was no difference between Akron's cost of serving Tallmadge and Akron's cost of serving the County. No evidence was presented by the City to indicate that the discriminatory rate furthers a legitimate interest or promotes the social welfare.

The trial court's decision in favor of Akron's admitted rate discrimination did not address the law applicable to the equal protection argument raised by the County. The court's reliance upon the possession of water contracts and alternative water sources is not supported by the evidence and such factors do not relate to the cost of service or the furtherance of legislative interests.

The City's suggestion that rate discrimination is needed to keep Tallmadge as a customer is equally invalid as a justification for the denial of equal protection. It may not base its water rates upon the value of service to the customer. Even if keeping Tallmadge as a customer were a legitimate interest, it could be accomplished without discrimination by simply serving the County at the Tallmadge rate.

As a matter of law, Akron's rate discrimination between Tallmadge and the County violates Article I, Section 2 of the Constitution of the State of Ohio and the 14th Amendment to the Constitution of the United States.

* * *

(Brief of Appellant at 6-9, 14, 30-31)

Reply Brief of Appellant
Ninth District Court of Appeals
Case No. 11169
(filed September 30, 1983)

* * *

Finally, the City claims that by signing the water agreement, the County has waived its right to challenge the rate differential. This argument was not made at the trial court level and no evidence to support it was produced at trial. The waiver of federal constitutional rights is governed by federal standards. *Boykin v. Alabama*, 395 U.S. 238 (1969). In civil as well as the criminal area, courts indulge every reasonable presumption against the waiver of rights. *Fuentes v. Shevin*, 407 U.S. 67 (1972). For a waiver to be effective, it must be clearly established that there was an intentional abandonment of a known right or privilege. *Brookhart v. Janis*, 384 U.S. 1 (1966).

* * *

In the present case, none of the requisites of waiver exist. The agreement does not state that the County waives it [sic] right to equal protection guaranteed by the Ohio and United States Constitutions. There is no consideration for the relinquishment of these rights. Furthermore, such a waiver would violate public policy since it subjects the County's water customers to unreasonably high and discriminatory rates. But even if the water agreement contained a specific, enforceable waiver of the County's constitutional rights, it would still be invalid since the County cannot waive the rights of its customers without their specific consent. For these reasons, the County has not waived its right to challenge the legality of Akron's water rates.

* * *

(Reply Brief of Appellant at 6-7)

Brief of Appellant
Ninth District Court of Appeals
Case No. 12755
(filed September 8, 1986)

* * *

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED UPHOLDING THE DISCRIMINATORY WATER RATE CONTRARY TO LAW AND THE EQUAL PROTECTION STANDARDS REQUIRED BY THE OHIO AND UNITED STATES CONSTITUTIONS.

A municipality's authority to operate a public utility is subject to the Ohio and United States constitutional restrictions against unjust discrimination. *State ex rel. Mt. Sinai Hospital v. Hickey* (1940), 137 Ohio St. 474. These restrictions are not abrogated by Sections 4 and 6 of Article XVIII of the Ohio Constitution and cannot be avoided by contract. *Western Reserve Steel Co. v. Village of Cuyahoga Heights* (1928), 118 Ohio St. 544.

* * *

Equal protection of the law is a fundamental right granted by both the Ohio and federal constitutions. The equal protection provisions of the Ohio and United States Constitutions are substantially the same, and Ohio courts have traditionally followed federal equal protection analysis. *Kinney v. Kaiser Aluminum and Chemical Corp.* (1975), 41 Ohio St. 2d 120. With regard to discrimination not involving suspect classifications or fundamental rights, the United States Supreme Court has employed a rationality standard. The Court will review: 1) whether the challenged distinction rationally furthers a legitimate, articulated municipal purpose; 2) whether the purpose is the one in fact intended by the legislative branch; and 3) whether that purpose is rationally furthered by the legislative means adopted. *Weinberger*

v. Wiesenfeld (1975), 420 U.S. 636; *McGinnis v. Royster*, (1973) 410 U.S. 133.

* * *

Akron's classification system is not related to the cost of service and does not promote a valid legislative purpose. It is instructive that even the trial court in its decision could not make the finding urged upon it, that a difference in classification existed. Such classification does not reflect lawful conditions which justify the rate differential based upon logic and equity, and is arbitrary, unreasonable, and violates the equal protection guaranteed by the Ohio and United States Constitutions. For this reason, this Court should reverse the judgment of the trial court and render judgment in favor of the County.

* * *

(Brief of Appellant at 14-15, 20-21)

Decision and Journal Entry
of the Court of Appeals
Case No. 12755
(Filed April 8, 1987)

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MAHONEY, J.

Summit County appeals a trial court's order upholding a water service contract between the county and the City of Akron. We reverse the judgment of the trial court and remand this cause for further proceedings according to law on the other relief sought by the county.

The facts of this case are extensively discussed in *Fairway Manor, Inc. v. Akron* (1983), 13 Ohio App. 3d 233. Briefly, Akron and Summit County entered into a

water service contract in 1979. Under the terms of the contract, Akron must provide Summit County with water and charge the county according to a contractual rate schedule. This rate schedule is based upon the "Akron rate" plus a surcharge percentage. The "Akron rate" is the rate paid by similar users within the city limits. Summit County contends that the contractual rate schedule is unjustly discriminatory.

Initially, the trial court upheld the water service contract. On appeal, we found that the trial court erred by considering the value of water service to the county as a factor in reaching its decision. The matter was remanded to the trial court for a determination of whether the rate paid by Summit County is justified. On remand, the trial court held that the Summit County rates are not "unjust, unreasonable, or unfair."

Summit County appeals contending:

ASSIGNMENTS OF ERROR

"I. The trial court erred in entering judgment in favor of the City of Akron where Akron failed to meet its burden of presenting evidence to justify its discriminatory rate.

"II. The trial court erred in considering value of service and entering judgment in favor of the City of Akron, without additional evidence, contrary to this court's mandate and the law of the case.

"III. The trial court erred upholding the discriminatory water rate contrary to law and the equal protection standards required by the Ohio and United States Constitutions.

"IV. The trial court erred in upholding the discriminatory water rate for reasons which are not supported by the evidence."

All of these assignments of error are interrelated and challenge the propriety of the trial court's factual finding that the rate paid to Akron by Summit County is not unjustly discriminatory. The court will therefore address these assignments together.

Summit County and the City of Tallmadge are both wholesale bulk purchasers of Akron water for use outside the city limits of Akron. Summit County's allegation of unjust discrimination is based upon the fact that Tallmadge pays the "Akron rate" plus a ten percent surcharge, while the county has paid as much as the "Akron rate" plus a one hundred and five percent surcharge.

Akron does not deny that such a disparity between the two rates exists. Rather, Akron contends that Summit County negotiated various contractual benefits that are not received by Tallmadge. According to Akron, the additional benefits justify the disparate rate. We do not agree.

The Supreme Court of Ohio has held that the only restraints imposed by law upon a municipality's proprietary operation of a public utility are that the rates charged must be reasonable and there must be no unjust discrimination among the customers served, taking into account their situation and classification. *Orr Felt Co. v. Piqua* (1983), 2 Ohio St. 3d 166, 170-171. (Citations omitted). The rule against discrimination applies to rates fixed by contract with the purchaser. See *The Western Reserve Steel Co. v. Cuyahoga Heights* (1928), 118 Ohio St. 544.

Courts and commentators generally agree that if a difference in rates is based upon a "reasonable and fair difference in conditions that equitably and logically justify a different rate, it is not an unjust discrimination." See 12 McQuillin, The Law of Municipal Corporations (3 Ed. Rev. 1986) 285-287, Section 34.101. (Citations omitted). While differences in conditions affecting the expense or difficulty of performing the service may fairly justify a difference in rates, discrimination may not be based upon the value of the service to the customer. *Id.*

In the case at bar, Summit County met its burden of providing sufficient evidence to demonstrate rate discrimination. On remand, it was incumbent upon Akron to show the existence of lawful conditions which justify the rate differential.

On remand, Akron had ample opportunity to introduce additional evidence. Instead, the city briefed the trial court on benefits received by Summit County and not received by Tallmadge. Assuming arguendo these differences exist, the record is devoid of any evidence tending to show that Akron encounters additional expense or difficulty attributable to the benefits that it provides to Summit County. The mere value of the benefits to Summit County, standing alone, is insufficient to justify the discriminatory rates.

SUMMARY

In so far as they are consistent with this opinion, Summit County's assignments of error are sustained. The judgment of the trial court is reversed and this case is remanded for further proceedings according to law on the other relief sought by the county.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.

Exceptions.

/s/ EDWARD J. MAHONEY
FOR THE COURT

QUILLIN, P. J.
CONCURS

GEORGE, J.
DISSENTS SAYING:

For the reasons stated in the dissenting opinion in *Fairway Manor, Inc. v. Akron* (1983), 13 Ohio App. 3d 233, I cannot agree with the majority.